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QUESTIONS AND ANSWERS ON CHILDREN'S INTERNET PROTECTION LEGISLATION

In General.

Q: *Why do we need to worry about compliance with the new Children's Internet Protection statute, since many experts are saying that the law will certainly be challenged in court and is likely to be held unconstitutional?*

A: There are some very strong legal arguments that the new legislation, like the Children's Online Protection Act before it, violates the United States Constitution. The statute will most likely be challenged in court, and Congress has foreseen this and provided expedited procedures for judicial consideration. Nevertheless, libraries and schools cannot count on the statute's being invalidated before it is applied, and thus they must be prepared to comply with these new mandates in a timely manner.

Q: *The legislation seems to consist of bills that were simply stuck together and appears on its face somewhat repetitive and confusing. Does legislative history provide any helpful guidance on what Congress intended?*

A: What we refer to generally as the Children's Internet Protection Act consists of three separate bills cobbled together imperfectly as two different "acts." The three bills, sponsored by Senator McCain, Senator Santorum, and Congressman Istook, were combined and enacted as the "Children's Internet Protection Act" (CIPA) and a separate "Neighborhood Children's Internet Protection Act." The two Senate proposals were actually competing bills during the 106th Congress; of the three original bills, only Senator McCain's was subject to hearings and committee consideration. The repetition occurs because Congress imposed very similar (but not identical) requirements through inserting language into three separate statutes: The Elementary and Secondary Education Act (ESEA); the Museum and Library Services Act (MLSA); and the section of the Communications Act extending universal services to schools in the form of telecommunications discounts (E-rate).

Q: *Does CIPA and the Neighborhood Act cover the same ground? What is the relationship between the two different "acts"?*

A: CIPA and the Neighborhood Act cover different ground and are not in conflict. Both acts comprising the new law set forth requirements concerning the "protection" of minors from certain materials. The CIPA covers visual depictions and prohibits funds from E-rate discounts, ESEA, and MLSA to schools and libraries unless they adopt and implement an Internet safety policy and operate technology protection measures. The Neighborhood Act covers a broader range of content and certain prohibited activities, pertains to the universal service discounts only, and requires schools and libraries to adopt and implement an Internet safety policy – essentially an "acceptable use" policy – addressing various specific issues and to do so with local participation. One element of the Internet safety policy is use of a technology protection measure (TPM);the requirements relating to TPMs and the timing and procedures for certifying their use are contained in the CIPA.

Q: *Three agencies – the FCC, the Department of Education, and the Institute of Museum and Library Services – have responsibilities under this new law. Is there a prospect for conflict or duplicative certification requirements?*

A: There will be no overlap, and hence no conflicting or duplicative requirements, among the three federal agencies involved. Every school and library receiving E-rate discounts must comply with the new amendments to section 254 of the Communications Act (as added by sections 1721 and 1732 of the new statute) and certify compliance with CIPA to the FCC. That is the only agency to which these entities are responsible, even if they receive ESEA or MLSA funds. Schools receiving ESEA funds for computers or accessing the Internet, but *no* E-rate discounts, must provide their certification to the Department of Education; libraries receiving MSLA funds for computers or accessing the Internet, but *no* E-rate discounts, must provide their certification under MLSA.

Q: *Will the FCC, D.Ed., and IMLS each have its own regulations to implement CIPA?*

A: The FCC has indicated its plans to publish proposed regulations before the end of January; public comment will be invited on this proposal. To meet the statutory deadline, the Commission must adopt final regulations by April 20th. Neither IMLS nor D.Ed. is required to adopt formal regulations and, as of this writing, both have indicated informally that they would prefer to proceed by developing guidance. ALA has urged that all three agencies coordinate any regulations and guidelines, and we believe they will do so.

Applicability and Scope.

Q: *Can libraries that do not receive E-rate discounts avoid application of CIPA (and the Neighborhood Act) if they do not use MLSA funds for computers used to access the Internet or for Internet connections?*

A: Yes, the requirements of CIPA are specifically tied to use of MSLA funds "to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the

Internet." If no MLSA funds are received by the library, or if those received may be used and in fact are used for purposes other than those quoted, then CIPA simply does not apply. (The Neighborhood Act is an amendment to the Communications Act and applies only to E-rate recipients.)

Q: *Does this new law apply if a library or school is not a direct recipient of federal funds, but only an indirect recipient through a state intermediary program?*

A: Yes, the law applies in all of the programs to direct and indirect recipients. For example, since the law states that "no funds made available" through MLSA or ESEA may be used to purchase computers or pay for Internet access, it does not matter whether the funds go directly to the school or library or through an intermediary.

Q: *Must a library that does not have a children's collection or programs, or one located in a retirement community or a college, still comply with this law? Are there procedures for obtaining an exemption for such libraries?*

A: The Act does not include academic or college libraries. Otherwise, the statute requires that libraries receiving E-rate discounts or MLSA funds for computers or Internet access adopt a policy for minors and adults that includes a TPM, even if minors are unlikely to use their computers. The TPM may be disabled "for bona fide research or other lawful purposes"; and it may be disabled for certain adult use that would be consistent with the objectives of the statute (protecting children only). There is no exemption procedure in the legislation, and it is not likely that one will be proposed in the FCC regulations.

Q: *The new law seems to require only use of TPMs that block or filter Internet access to "visual depictions" that are obscene, child pornography, or harmful to minors. Does that mean that no steps need be taken to block or filter text, whatever the content? (Does this also mean that Braille and Talking Book Libraries for blind children are not covered?)*

A: The definition of TPM includes only "technology that blocks or filters Internet access to visual depictions . . . ." Therefore, the TPM need not affect text, whatever the content, and setting a browser to "text only" would satisfy this requirement. However, the Neighborhood Act, covering E-rate only, applies more broadly. It requires adoption and implementation of an Internet safety policy that addresses "access by minors to inappropriate matter on the Internet" (not limited to visual depictions) and other matters pertaining to minors (relating to security in chat rooms, hacking, and disclosure of personal identification information). Thus the Internet safety policy required of E-rate recipients by the new law clearly must extend beyond visual depictions. (Under the plain language of the statute, even Braille and Talking Book Libraries would arguably need safety policies covering visual depictions, since the safety policy must include the operation of a TPM "with respect to any . . . computers with Internet access that protects against [even theoretical] access through such computers to visual depictions that are . . . obscene," etc.)

Q: *Will the required use of TPMs apply where computers were purchased in the past with ESEA or MLSA funds, but such funds are not being used for Internet access and no E-rate discount is being received by the school or library?*

A: While Congress might have applied the requirements of CIPA to attempt to require that any computer purchased with federal funds in the past must be subject to use of a TPM, it did not do so. The law states that "no funds . . . may be used to *purchase* [emphasis added] computers used to access the Internet, or to pay for direct costs associated with accessing the Internet . . . ." unless the safety policy is in place and certification is made.

Internet safety policy, Certification, and Enforcement.

Q: *What must an "Internet Safety Policy" look like?*

A: The statute provides no specific format, and it is unlikely that the relevant agencies will either. Schools and libraries will have flexibility to develop their own policies, which may correspond to a current "acceptable use policy" – so long as they address the elements required by the law. For entities receiving E-rate discounts, a broader policy with local input is required.

Q: *What kind of "certification" will be required by the FCC, D.Ed., and IMLS?*

A: CIPA requires certification of compliance with the statute's requirements that the covered school or library has in place the required Internet safety policy, which includes the operation of a TPM, and is enforcing the operation of the TMP during use of its computers. Staff of the relevant agencies have informally suggested that the certification will be straight-forward and simple and will resemble those on current applications, which are required by other federal laws.

Q: *What if the school or library that ultimately receives the funds or discount is not the "applicant," as is the case where there are state agencies or consortia who apply for the funds from the federal agencies and pass them on to other entities; who makes the certification?*

A: Where the statute applies by virtue of receipt of an E-rate discount, the affected library or "the school, school board, local educational agency, or other authority with responsibility for administration of the school" must make the required certification. If no E-rate discount is implicated, then certifications must be made by "a local educational agency with responsibility for a school" receiving ESEA funds or "a library" receiving MLSA funds. Since, in many cases, the entity required to make the certification will not be the same entity applying for the funding or E-rate, it is likely that the agencies will require the initial grant or discount applicant to make a certification that, in turn, would perforce be based upon a certification from the ultimate recipient.

Timing of Certification and Enforcement.

Q: *How does the timing for implementation relative to each of the affected programs (MLSA, ESEA, and E-rate) apply to specific program years, and won't issues related to timing differ by state?*

A: Unfortunately, not only does implementation timing differ from agency to agency and potentially from state to state, but also – within the Department of Education – from program to program. A detailed timeline for implementation of the new statute has been developed as a separate document – at least to the extent it is possible to determine timing in the absence of definitive agency interpretations.

Q: *How do the agencies intend to enforce compliance with CIPA's requirements?*

A: The Act prescribes one set of compliance enforcement requirements for the universal service discounts program and another set of requirements for the programs under ESEA and MLSA. Entities that fail to submit the certification as required for universal service discounts will be ineligible for such discounts/fund, and entities that fail to comply with their certifications will have their discounts suspended and would be required to reimburse funds or discounts received. For ESEA and MSLA programs, the act contemplates that the responsible agency may withhold further payments or suspend the funding and issue a complaint to compel compliance through a cease and desist order. The CIPA allows all of the covered agencies to enter into a compliance agreement when a covered school or library "is failing to comply substantially with the requirements" of the law. However, the recovery of funds already paid to the recipients of ESEA and MSLA program monies is specifically prohibited. Any withholding of funds must be subject to traditional due process considerations applicable to federal beneficiaries.

Q: *If a school or library certifies that it is in compliance, how would the responsible agency determine otherwise?*

A: If the school or library has in place an Internet safety policy that involves use of any TPM, and if it certifies that it is enforcing the operation of the TPM, then noncompliance could be determined if the responsible agency receives a complaint and through investigation concludes that the certification was inaccurate or false. Otherwise, the failure to certify would constitute the most likely ground for noncompliance.

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